UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

In re: Chapter 13
Case No. 00-06154-8W3

John Robert Newman,

Debtor.
_________________________________/

In re: Chapter 13
Case No. 01-12534-8W3

Michael Barnett and
Kathy Barnett,

Debtors.
_________________________________/

Memorandum Opinion Setting Forth
Procedures Governing Compensation of
Counsel for Debtors in Chapter 13 Cases

These cases came on for hearing on March 16, 2001, with respect to the case of John Robert Newman ("2001 Hearing"), and on August 9, 2002, with respect to the case of Michael Barnett and Kathy Barnett ("2002 Hearing," collectively, the "Hearings"), for the purpose of addressing various fee applications and related motions that have been filed in these and other cases,[1] and in doing so, determining the appropriate procedures and standards to follow in connection with compensation for debtors' counsel in chapter 13 cases. The law firm of Feinberg, Isaak &

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[1] Other cases with similar issues were also heard at the Hearings. The court has or will enter separate orders in these and other cases affected by the conclusions reached herein and will reference, where

Smith, P.A., d/b/a Debt Relief Legal Centers ("Debt Relief"), counsel for the debtors in these cases, participated at the Hearings through its own counsel. Also actively participating at the Hearings were the Office of the U.S. Trustee and the standing chapter 13 trustee, Terry Smith ("Chapter 13 Trustee").

The 2001 Hearing's main focus was the pending Debt Relief fee applications and the standards and procedures to be followed in the future with respect to seeking compensation for services rendered by debtor's counsel in a chapter 13 case. The 2002 Hearing focused on the propriety of obtaining an assignment of funds held by the Chapter 13 Trustee at the time of conversion or dismissal of a case to secure payment of any balance owed to debtor's counsel for fees.

At the conclusion of the Hearings, the Court announced its rulings, dealing comprehensively with the procedures and standards to be applied with respect to compensation of counsel in chapter 13 cases. Because the procedures fashioned by the Court in these cases have been applied generally to all chapter 13 cases pending before this judge, the Court considers it appropriate to enter this memorandum opinion for the benefit of other parties and

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appropriate, this opinion as the basis for the rulings contained in such orders.

their counsel who appear before the Court in chapter 13 cases.

Issues

The issues considered by the Court at the Hearings are:

a. Must attorneys representing debtors in chapter 13 cases file fee applications with contemporaneous time records, or may the court establish a presumptively reasonable fee to apply generally to services of debtor's counsel in a chapter 13 case?

b. If a presumptively reasonable fee is appropriate, what amount is presumptively reasonable?

c. What services must an attorney provide in order to be entitled to the presumptively reasonable fee?

d. In a chapter 13 case in which a plan is confirmed, what is the appropriate timing of payment of the balance of the presumptively reasonable fee after crediting the initial retainer?

e. What amount is a presumptively reasonable fee in a chapter 13 case in which a plan is not confirmed and the case is dismissed or converted?

f. Is it appropriate for debtor's counsel in a chapter 13 case to take an assignment from a debtor of the amounts in the possession of the standing chapter 13 trustee to secure payment of fees due in the event a plan is not confirmed and the case is dismissed or converted prior to confirmation?

Discussion

Section 330 of Title 11 ("Bankruptcy Code") deals with the compensation of professionals in bankruptcy cases. As a result of Congress's amendment to this section in the Bankruptcy Reform Act of 1994, debtor's counsel generally may not be compensated from bankruptcy estate assets. *In re American Steel Products, Inc.*, 197 F.3d 1354 (11th Cir. 1999)(holding that the amended version of section 330 precludes award of attorneys fees to debtor's counsel in chapter 7 and chapter 11 cases). An exception to this prohibition is found in section 330(a)(4)(B) which applies to attorneys representing individuals in chapter 12 and chapter 13 cases. Pertinent to these cases, under section 330(a)(4)(B), a court may allow reasonable compensation to the debtor's attorney for representing the interests of the debtor in connection with a chapter 13 case. The issues addressed herein concern the procedures and standards to be followed in determining reasonable compensation for debtors' attorneys in routine consumer chapter 13 cases.

I. Lodestar Method.

As a general proposition, the standards to be applied in determining reasonable compensation for professionals providing services in connection with bankruptcy cases are the same as the standards applied by federal courts generally when called upon to review and determine a reasonable award of compensation to attorneys. That is, the "lodestar" method is applied in determining a reasonable fee. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), made applicable to bankruptcy cases in *In re First Colonial Corp. of America*, 544 F.2d 1291, 1298-1300 (5th Cir. 1977), cert. denied, 431 U.S. 904; *Grant v. George Schumann Tire & Battery Co.,* 908 F.2d 874, 879 (11th Cir. 1990); *In re Howell,* 226 B.R. 279, 282 (Bankr. M.D. Fla. 1998).

A decision dealing comprehensively with the practical application of the lodestar method is *Norman v. Housing Authority of the City of Montgomery,* 836 F.2d 1292 (11th Cir. 1988). In *Norman,* the Eleventh Circuit noted that the Supreme Court "has declared that the lodestar as calculated in *Hensley* includes all of the twelve factors derived from the ABA Code of Professional Responsibility DR 2-106 (1980) and adopted in *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714 (5th Cir. 1974)...."). *Norman,* 836 F.2d at 1299 (citing to the case of *Hensly v. Eckerhart,* 461 U.S. 424 (1983)). As discussed in *Norman,* the Supreme Court adopted the lodestar approach because "it produces a more objective estimate and ought to be a better assurance of more even results." *Norman,* 836 F.2d at 1299. In the amendments to section 330 contained in the Bankruptcy Reform Act of 1994, the lodestar approach was codified in section 330(a)(3)(A) which requires, *inter alia,* that the court consider the "time spent on such services." Bankruptcy Code § 330(a)(3)(A).

Accordingly, the starting point in determining an "objective estimate of the value of a lawyer's services is to multiply hours reasonably expended by a reasonable hourly rate." *Norman,* 836 F.2d at 1299 (citing *Hensley,* 461 U.S. at 433). As part of this analysis, a court must ascertain whether the hours spent by counsel were reasonably expended. Hours that are "excessive, redundant, or otherwise unnecessary" are excluded from the amount claimed. *Id.*

To perform this analysis, a court must necessarily be supplied with evidence of the nature and quantity of time expended. Accordingly, it is well established that in order for a court to apply the lodestar method in determining fees, counsel must supply the court with contemporaneous time records describing in detail the dates, amounts, and specific services provided. *In re First Colonial Corp. of America*, 544 F.2d at 1300; *In re Finlasen,* 250 B.R. 446, 448 (Bankr. S.D. Fla. 2000); *In re Howell,* 226 B.R. 279, 281 (Bankr. M.D. Fla. 1998). The failure to maintain such records may result in a denial of any fees to counsel representing the debtor professionals. *See, e.g., In re Haynes*, 216 B.R. 440, 443 (Bankr. D. Col. 1997)("Without such time records, attorneys cannot carry their burden of justifying the fees charged or requested").

II. Establishing a Presumptively Reasonable Fee as an Alternative to the Lodestar Method.

Based on the evidence at the 2001 Hearing (as well as this Court's own observations), and notwithstanding the legal requirements adopted by the case law and as contained in section 330(a)(3)(A), the Court concludes that most attorneys practicing before this Court with a "volume consumer practice" do not keep contemporaneous time records. They explain that keeping of such records only adds to the expense of consumer chapter 13 cases. The fee application usually filed in such cases contains at best what could be construed as mere estimates of time spent and is woefully inadequate and useless to the Court in determining what is an appropriate fee.

To address the practical realities of consumer chapter 13 practice, and given the number of routine consumer cases that are dealt with by a bankruptcy court, a number of courts have concluded that it is within a court's discretion to set a presumptively reasonable fee as an alternative to requiring documentation to substantiate the number of hours expended under the lodestar method. *See In* *re Geraci,* 138 F.3d 314, 321 (7th Cir. 1998); *In re Finlasen,* 250 B.R. 446, 449 (Bankr. S.D. Fla. 2000)(referring to S.D. Local Rule 2016-1(B)(2) and the "Chapter 13 Fee Guidelines"); *In re Famisaran,* 224 B.R. 886, 898 (Bankr. N.D. Ill. 1998); *In re Allen,* 1995 WL 548855 (Bankr. S.D. Ga. 1995).

This Court, likewise, concludes that it is appropriate to establish a presumptively reasonable fee to be used at the option of debtor's counsel in routine consumer chapter 13 cases. The establishment of a presumptively reasonable fee, as an alternative, does not deny counsel the right to apply for fees in a given case under the lodestar method. Accordingly, in cases that present unusual circumstances necessitating the expenditure of time beyond that typical in a chapter 13 case, an attorney may follow the procedures outlined in *Norman,* 836 F.2d 1292. *In re Allen,* 1995 WL 548855 (Bankr. S.D. Ga. 1995). This would occur in the limited number of cases that are more complex and thus require substantially more time than would be expended in a routine case. Collier on Bankruptcy ¶ 329.04[1][a].

The use of a presumptively reasonable fee also does not deny the debtor the right to object to the presumptively reasonable fee in a particular case. However, in such a case, the debtor will have the burden of rebutting the reasonableness of the presumptively reasonable fee.

In practice, in the vast majority of cases, counsel have and will continue to rely on the presumptively reasonable fee as an alternative to the lodestar method, and debtors will only rarely have occasion to object. Affording debtor's counsel with this option reduces the cost of a chapter 13 case by reducing the total time expended by the amount of time that is required to keep contemporaneous time sheets and prepare a detailed fee application. Furthermore, this option also promotes the economic use of limited judicial time in cases that are routine and quite similar to each other. By way of illustration, in calendar year 2002, approximately 2,000 chapter 13 cases were assigned to each of the bankruptcy judges that preside over Tampa Division chapter 13 cases. On a practical level, conducting a detailed review of fee applications in each of these cases would be wasteful of limited judicial resources. As discussed in *In re Howell,* 226 B.R. 279, 282 (Bankr. M.D. Fla. 1998), in this District, the approach of using a presumptively reasonable fee, "has the advantage of simplicity, efficiency, and economy."

Finally, and consistent with the basis for the Supreme Court's election to use the lodestar approach, this Court concludes that the approach also "produces a more objective fee award and assures even results in routine and substantially similar chapter 13 cases." *Norman*, 836 F.2d at 1299.

A. <u>Presumptively Reasonable Fee in Cases Where Chapter 13 Plan Confirmed</u>.

At the 2001 Hearing in which counsel for the U.S. Trustee and the Chapter 13 Trustee actively participated, the Court considered evidence on the issue of an appropriate amount for a presumptively reasonable fee. This evidence principally consisted of amounts established by other courts in Florida -- principally the Orlando Division of this Court and the bankruptcy court for the Southern District of Florida; opinion testimony of the amount of time expended in the representation of chapter 13 debtors by an experienced bankruptcy attorney; and the testimony of attorneys of Debt Relief as to the extent of services required in prosecuting a chapter 13 case through to conclusion. The Court also drew on its own familiarity with the fees charged generally in the legal profession for services rendered in connection with bankruptcy and non-bankruptcy related work. *See First Colonial Corp. of America*, 544 F.2d at 1300.

Based on this review, this Court concludes that subject to certain conditions and limitations discussed below, a presumptively reasonable fee for debtor's counsel in chapter 13 cases in which a plan is confirmed (dismissed or converted cases are dealt with separately below) is any amount agreed to by the debtor and counsel prior to the filing not to exceed $2,500 inclusive of all costs except the filing fees. Debtor's counsel desiring to rely on the presumptively reasonable fee, as opposed to keeping contemporaneous time records, may do so subject to the following conditions ("Normal Terms and Conditions"):

1. The total amount to be paid by the debtor to counsel for fees and reimbursement of expenses (exclusive of the filing fee) for all services rendered of whatever nature during the term of the representation shall not exceed the *lesser of* $2,500 *or* the amount agreed to be paid by the debtor prior to the commencement of the case as disclosed in the statement filed by counsel pursuant to Fed. R. Bankr. P. 2016 ("Presumptively Reasonable Fee").

2. The Presumptively Reasonable Fee shall be in full compensation for all services rendered by counsel and expenses incurred on behalf of the debtor from the beginning of the representation until 36 months after the date of the order confirming the plan. The only exception to this "soup to nuts" approach is extraordinary circumstances (e.g., complex claims litigation with the

I.R.S.), and then only on court order obtained prior to rendering the extraordinary services.

3. No more than $1,500 may be paid to counsel from any source in connection with the case prior to 12 months after the petition date ("Initial $1,500"). Provided sufficient funds are available and absent any objection by the debtor, the balance of the Initial $1,500 after crediting any retainer received pre-petition, shall be paid by the Chapter 13 Trustee on the later of 12 months after the petition date or 10 days after the date of the order confirming the plan or as soon thereafter as funds are available.

4. The balance owed after payment of the Initial $1,500 may only be paid at the rate of $50 per month commencing after confirmation of the chapter 13 plan.

5. The order confirming the chapter 13 plan shall contain a provision awarding the Presumptively Reasonable Fee and providing ten days for the debtor to file an objection to the award of the Presumptively Reasonable Fee. Absent objection, the Presumptively Reasonable Fee shall be paid in the manner described herein.

B. <u>Presumptively Reasonable Fee Where Chapter 13 Converted or Dismissed</u>.

Under the local practice of this division of the Middle District of Florida, confirmation hearings are not scheduled until after the expiration of the claims bar dates for both non-governmental and governmental claimants. Accordingly, the hearing on confirmation is not scheduled until after the expiration of 180 days. Approximately 30 percent of the chapter 13 cases are dismissed (or converted at the option of the debtor) prior to the hearing on confirmation, principally due to either defaults in payments to the Chapter 13 trustee or the granting of relief from the stay with respect to the debtor's homestead, there no longer being a need for relief under chapter 13.

As a result, attorneys representing chapter 13 debtors perceive, and correctly so, that there is a material chance that a case will not be confirmed and that they will not be paid beyond the amount received as a pre-petition retainer. Because the amount of a typical initial retainer is often less than half of the total agreed fee and because more than half of the services to be rendered are rendered during the first seven to eight months of the case, attorneys representing chapter 13 debtors are at significant risk of not being paid for the value of the services rendered in dismissed or converted cases.

This risk of nonpayment exists even in cases where the debtors have funds available from which payment can be made at the time of dismissal or conversion but simply choose not to do so. In this regard, Bankruptcy Code section 1326(a) requires that a chapter 13 debtor commence making payments proposed under the plan within 30 days after filing the plan (which under Fed. Bankr. R. Proc. 3015(b) ordinarily must be filed with the petition at the commencement of the case). These payments are held by the Chapter 13 Trustee until confirmation. Bankruptcy Code § 1326(a)(2). If the case is confirmed, the funds are paid to the creditors in accordance with the plan. *Id.* Under the procedures adopted herein in cases in which plans are confirmed, this will result in counsel being paid an amount up to $1,500 after crediting the pre-petition retainer.

However, Bankruptcy Code section 1326(a)(2) provides that if the plan is not confirmed, then the trustee must return any such payments to the debtor after deducting any allowed administrative claim. While the debtor will receive these funds back, the debtor may or may not be inclined to pay any further fees to counsel, even if the pre-petition retainer is insufficient to pay for the value of the services rendered prior to dismissal or conversion.

In order to address this concern, Debt Relief established a practice at one time to require the debtor, as part of the original retention agreement, to execute an assignment of the funds held by the Chapter 13 Trustee and deliver the assignment to the Chapter 13 Trustee at the section 341 meeting. One of the issues before the Court at the 2002 Hearing was the propriety of this arrangement and specifically, whether it is improper to obtain such an assignment and then obtain a transfer of these funds directly from the Chapter 13 Trustee on dismissal or conversion without specific court authorization.

It is the conclusion of the Court that this practice is improper for several reasons. First, it circumvents the oversight role of the court under Bankruptcy Code section 329 with respect to fees paid by debtors to their counsel. Second, the debtor is deprived of the opportunity to contest the fee amount in light of the quantity and quality of the services actually rendered. Third, the existence of the assignment may create an ethical tension between debtor’s counsel’s obligation in representing the interests of the client and counsel’s own interests in being paid quickly upon dismissal rather than over time under a confirmed plan. Finally, there is a substantial issue as to whether the delivery of the assignment agreement to the Chapter 13 Trustee -- an act that could only be construed as an effort to perfect an interest in a fund to secure payment of a fee -- is a violation of the automatic stay. *See* Bankruptcy Code § 362(a)(5).

The conclusion that obtaining an assignment of this type is improper does not mean, however, that debtor’s counsel should be left at the mercy of the good intentions of the debtor to pay over any balance owed from the funds received when the case is dismissed or converted. In fact, the Bankruptcy Code provides a framework in which a procedure can be established to ensure that the rights of the respective parties can be protected in instances where chapter 13 cases are dismissed or converted.

Specifically, the debtor's right to receive funds in the possession of the Chapter 13 Trustee if the case is dismissed or converted is limited to the funds remaining "after deducting any unpaid claim allowed under section 503(b)." Bankruptcy Code § 1326(a)(2). Included within section 503(b)(2) is compensation awarded under section 330(a). Under section 330(a)(4)(B), the court may allow reasonable compensation to a chapter 13 debtor's attorney for representation in connection with the case. Accordingly, it is clear that an attorney representing a debtor in a case that has been or is in the process of being dismissed or converted has the right to seek an award of compensation to be paid from the funds on hand with the Chapter 13 Trustee, prior to the distribution of such funds to the debtor.

Accordingly, an attorney may file a fee application and follow the requirements for seeking compensation under the lodestar method when cases are dismissed or converted.

Alternatively, for the same reasons discussed in the context of confirmed plans, a court may establish a presumptively reasonable fee for services rendered in cases that are dismissed or converted. Indeed, it appears necessary to do so in light of the procedures approved herein under which contemporaneous time records are not required in routine cases in which plans are confirmed so long as counsel is satisfied with the Presumptively Reasonable Fee.

The question of the amount to be established as a presumptively reasonable fee in dismissed or converted cases was one of the principal issues dealt with at the 2002 Hearing. As discussed at that hearing, in determining the amount of a presumptively reasonable fee to be awarded in dismissed or converted cases, the Court must ensure that the amount is, on the one hand fair, and on the other, does not create a disincentive for the attorney to aggressively pursue confirmation of the case. That is, if the amount is higher than the Initial $1,500 that the attorney would be receiving in confirmed cases, then an inherent tension arises between the attorney’s duty to zealously represent the client’s interests and the attorney’s own economic self interest. For example, if the presumptively reasonable fee for a dismissed case were set at $2,000, then the attorney will be faced with an immediate award of $2,000 if the case were dismissed or converted (assuming that the trustee held sufficient funds), which is $500 less than the Initial $1,500 the attorney would be awarded at confirmation. Under this example, while the attorney would receive a higher amount in a confirmed case, since the Presumptively Reasonable Fee is set at $2,500, the remainder of the fee, or $1,000, is to be paid over time. Under such circumstances, an attorney may decide that he or she is better off receiving the $2,000 fee for dismissed or converted cases earlier than wait for the full amount over time. This, of course, may not be in the debtor’s interest.

Based on these competing factors and evidence taken at the 2002 Hearing, the Court concludes that $1,500 is an appropriate and presumptively reasonable fee to be awarded pursuant to section 330(a)(4)(B) in dismissed or converted cases. To the extent funds are available in the possession of the Chapter 13 Trustee at the time of dismissal or conversion, the Chapter 13 Trustee shall deduct such amount (after crediting any retainer received pre-petition) from the funds otherwise to be paid to the debtor under section 1326(a)(2), with the balance to be paid to the debtor. This amount shall be paid without the necessity of filing an application or obtaining a further order authorizing such payment, provided, however, that the following conditions are met by debtor's counsel:

1. The total amount to be paid by the debtor to counsel for fees and reimbursement of expenses (exclusive of the filing fees) for all services rendered of whatever nature during the term of the representation shall not exceed the *lesser of* $1,500 *or* the total amount agreed to be paid by the debtor prior to the commencement of the case as disclosed in the statement filed by counsel pursuant to Fed. R. Bankr. P. 2016 ("Dismissed Case Presumptively Reasonable Fee").

2. The Dismissed Case Presumptively Reasonable Fee shall be in full compensation for all services rendered by counsel and expenses incurred on behalf of the debtor from the beginning of the representation until dismissal or conversion of the case.

3. The order dismissing or converting the chapter 13 case shall contain a provision awarding the Dismissed Case Presumptively Reasonable Fee and providing ten days for the debtor to file an objection to the award of the Dismissed Case Presumptively Reasonable Fee. Absent objection, the Dismissed Case Presumptively Reasonable Fee shall be paid in the manner described herein.

Conclusion

Attorneys representing debtors in chapter 13 cases need not file fee applications with contemporaneous time records if they intend to rely on the presumptively reasonable fees established by the Court. In cases in which a plan is confirmed, the Court establishes $2,500 as a presumptively reasonable fee subject to compliance by the attorney with the conditions set forth in this opinion (including the requirement that no additional fees or costs be charged to a chapter 13 debtor whatsoever, absent prior approval and then only under extraordinary circumstances).

In a chapter 13 case in which a plan is not confirmed and the case is dismissed or converted, the Court establishes $1,500 as a presumptively reasonable fee subject to compliance by the attorney with the conditions set forth in this opinion. Attorneys are prohibited from obtaining an assignment of the funds held by the Chapter 13 Trustee to secure payment of their fees.

As an alternative to relying on the presumptively reasonable fees outlined above, an attorney representing a debtor in a chapter 13 case may file a fee application in full compliance with the lodestar method to include time records made contemporaneously at the time services are provided.

By separate orders, the Court has or will dispose of numerous pending applications and motions that this opinion addresses.

DONE in Tampa, Florida, on February 18, 2003.

/s/ Michael G. Williamson
Michael G. Williamson
United States Bankruptcy Judge